

REMARKS

This Amendment responds to the Final Office Action mailed September 14, 2009 in the above-identified application. A Request For Continued Examination (RCE) accompanies this Amendment. Based on the foregoing amendments and the following comments, allowance of the application is respectfully requested.

Claims 1-34 are pending in the application. By this Amendment, claim 1 has been amended. No new matter has been added.

The Examiner's courtesy in conducting telephone interviews with Applicants' attorney on December 17, 2009 and December 22, 2009 is acknowledged with appreciation. During the telephone interview of December 17, 2009, a proposed amendment to claim 1 was discussed. The Examiner indicated that the proposed amendment failed to satisfy §101 and §112, second paragraph. Separately, Applicants' attorney noted that the Response to Arguments section of the Final Office Action mailed September 14, 2009 appears to argue that the Djupesland device could be used without the mouthpiece, rather than relying on the teachings of Djupesland. The Examiner took these comments under consideration.

While Applicants' attorney did not agree with the §101 and §112, second paragraph issues, a second proposed amendment to claim 1 was discussed on December 22, 2009. The Examiner indicated that the second proposed amendment failed to satisfy §112, second paragraph. In response to an inquiry by Applicants' attorney, the Examiner indicated that use of the "consisting of" transitional phrase in claim 1 would distinguish over the rejection based on Chantrel in view of Djupesland.

The Examiner has rejected claims 1-34 under 35 U.S.C. §112, first paragraph, as failing to comply with the written description requirement. While Applicants do not agree with the rejection, the language identified in the rejection has been canceled from claim 1. Accordingly, withdrawal of the rejection under 35 U.S.C. §112, first paragraph, is respectfully requested.

The Examiner has rejected claims 1, 3-6, 8-10, 13-16 and 18-34 under 35 U.S.C. §103(a) as unpatentable over Chantrel et al. (EP 0507707) in view of Djupesland (WO 00/51672). Claims 2, 11, 12, and 17 are rejected under 35 U.S.C. §103(a) as unpatentable over Chantrel et al. in view of Djupesland as applied to claim 1, further in view of Brugger (DE 3238149). Claim 7 is rejected under 35 U.S.C. §103(a) as unpatentable over Chantrel et al. in view of Djupesland as applied to claim 1, further in view of Landis et al. (US 5,687,715). The rejections are respectfully traversed for the following reasons.

Chantrel discloses a therapeutic nebulizer which is equipped with an inhaler nozzle to be applied to a patient's nose. A constant aerosol flow is guided through the patient's nose, and pressure fluctuations are superimposed which are intended to cause the aerosol particles/droplets in the main aerosol flow to pass through the nostril and into the paranasal sinuses. Chantrel fails to disclose a flow resistance device at the other of the alae of the patient's nose.

Amended claim 1 is directed to a therapeutic aerosol device *consisting of* a nebulizer device, a nosepiece and a flow resistance device. As set forth in MPEP §2111.03, the transitional phrase "consisting of" excludes any element, step, or ingredient not specified in the claim.

Djupesland discloses a device for delivering a substance to the nasal airway of patient including, as a key feature, a closure unit for causing the closure of the oropharyngeal velum of the patient. Djupesland also teaches a delivery unit for delivering a gas flow entraining a substance to one of the nostrils of the patient, but at such driving pressure, as to flow around the posterior margin of the nasal septum and out the other nostril of the patient. However, the key feature of the teaching of Djupesland is a device to close the oropharyngeal velum of the patient. This feature is described numerous times in the specification of Djupesland, as set forth in previous responses. According to Djupesland, a device to close the oropharyngeal velum is required. There is no teaching in Djupesland to rely on the effects of the outlet unit alone.

The skilled person reviewing the combination of Chantrel and Djupesland would not be taught or motivated to provide a therapeutic aerosol device as claimed, which excludes a device,

such as the mouthpiece of Djupesland, to close the oropharyngeal velum. Since amended claim 1 excludes a device to close the oropharyngeal velum, claim 1 is clearly and patentably distinguished over Chantrel in view of Djupesland.

In the Response to Arguments sections of the Office Action, the Examiner asserts that “Though the device of Djupesland discloses two nosepieces and a mouthpiece, as the mouthpieces of FIGS. 3 and 4 lack connection to the associated nosepieces, there is nothing that would structurally preclude the embodiments of the nosepieces to be utilized without the mouthpiece utilized to close/seal the nasal cavities from the throat and mouth of the patient” (Office Action, page 9). Applicant must respectfully disagree with this reasoning. The issue in determining obviousness is what is taught or suggested by the reference, not how the disclosed device could be used. For these additional reasons, amended claim 1 is clearly and patentably distinguished over Chantrel in view of Djupesland.

Based upon the above discussion, amended claim 1 is in condition for allowance, and withdrawal of the rejection is respectfully requested. Claims 2-34 depend from claim 1 and are patentable over the cited references for at least the same reasons as claim 1.

Based upon the above discussion, claims 1-34 are in condition for allowance.

CONCLUSION

In view of the foregoing amendments and remarks, this application should now be in condition for allowance. A notice to this effect is respectfully requested. If the Examiner believes, after this amendment, that the application is not in condition for allowance, the Examiner is requested to call the Applicants' representative at the telephone number indicated below to discuss any outstanding issues relating to the allowability of the application.

If this response is not considered timely filed and if a request for an extension of time is otherwise absent, Applicants hereby request any necessary extension of time. If there is a fee occasioned by this response, including an extension fee, please charge any deficiency to Deposit Account No. 23/2825 under Docket No. P0777.70000US00 from which the undersigned is authorized to draw.

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Respectfully submitted,

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